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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

BENJAMIN CAIN,
doing business as
CAIN'S TRUCK LINES,
Petitioner

v.

CLARA BOWLBY,
Respondent

No. 552

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND SUPPORTING BRIEF.

ROBERT L. HOLLIDAY,
El Paso, Texas

HAROLD L. SIMS,
El Paso, Texas

Attorneys for Petitioner.

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IN THE

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BENJAMIN CAIN,
doing business as
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Petitioner

v.

CLARA BOWLBY,
Respondent

No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND SUPPORTING BRIEF.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Benjamin Cain, doing business as Cain's Truck Lines, respectfully presents this, his petition for certiorari to the Honorable Circuit Court of Appeals of the United States, for the Tenth Circuit, and to such end respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a suit for damages under the New Mexico penal death statute by respondent, Clara Bowlby, against petitioner growing out of a collision between two motor vehicles upon a public highway in the State of New Mexico on August 6, 1938. One of the vehicles was a large motor truck belonging to petitioner, who was at that time engaged in the business of a common carrier of freight for hire by motor vehicle, operating a line of trucks between Oklahoma City, Oklahoma and Los Angeles, California. The truck of petitioner was on its regular run from Los Angeles to Oklahoma City, and at the time of the accident was loaded with a heavy cargo of freight, and was in charge of one of petitioner's drivers. Petitioner was operating under and by virtue of a certificate of public convenience and necessity issued to him by the Interstate Commerce Commission, and authorizing him to carry freight, but not passengers, in interstate commerce. (R. 6-8, 19-21, 204-205.)

The other vehicle was a Buick coupe in which respondent and her husband, Dr. L. M. Bowlby, were riding. In the collision, respondent's husband, Dr. Bowlby, was killed and the Bowlby automobile was damaged. (R. 6-8, 19-21, 204-205.)

Respondent sued petitioner in her individual capacity to recover the New Mexico statutory penalty of $7,500.00 for the death of her husband, and also asked for the further sum of $800.00 as damage to the Bowlby automobile. She alleged that petitioner's truck was negligently operated on the occasion in question. (R. 6-8).

The New Mexico statute (Chapter 36, Section 101, Compiled Statutes of New Mexico, 1929, as amended) upon which respondent exclusively based her claim for the $7,500.00 penalty for the death of her husband (R. 6-8, 204-205) is as follows:

> "Whenever any person shall die from any injury resulting from, or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car, or train of cars, or of any driver of any stage coach or other public conveyance, while in charge of same as driver; and when any passenger shall die from injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or in any stage coach, or other public conveyance, the corporation, individual or individuals, in whose employ any such officer, agent, servant, employee, engineer or driver, shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stage coach, or other public conveyance, at the time any injury is received, resulting from, or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying, the sum of Seven Thousand Five Hundred Dollars, which may be sued and recovered; first, by the husband or wife of the deceased; or second, if there be no husband or wife, or if he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or third, if such deceased be a minor and unmarried, then by the father and mother; or, fourth, if the deceased be over twenty-one years of age and unmarried, by a dependent father or mother or dependent brother or sister, who may join suit; and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor. In suits instituted under this section, it shall

be competent for the defendant for his defense to show that the defect or insufficiency named in this section, was not of a negligent defect or insufficiency."

As said in the majority opinion of the Circuit Court of Appeals:

> "The statute was initially enacted in 1882, and was the first section of a general act relating to damages for wrongful death. As originally enacted it authorized the recovery of $5000. By the amendment of 1931 the authorized sum was increased to $7500, and a dependent father or mother or dependent brother or sister of an unmarried deceased over the age of twenty-one years was included among those entitled to maintain an action. The second and third sections in the original act were addressed to the recovery of compensatory damages in other cases of wrongful death ,and with certain changes which are not material here they are now sections 36-102 and 36-104, N. M. Comp. St. 1929." (R. 204).

For convenience said sections 36-102 and 36-104 are fully copied in the appendix hereof.

Petitioner contended in the trial court and in the Circuit Court of Appeals (R. 205) that said penal statute (36-101) was not applicable to petitioner's motor freight truck and driver, in that said truck was not a locomotive, car or train of cars, nor was it "a stagecoach or other public conveyance." Petitioner further contended and now contends that the cause of action, if any, for the death of respondent's husband comes within the general death statute allowing compensatory damages with neither maximum nor minimum amounts, that is, Section 36-102 of the New Mexico Compiled Statutes, 1929, and that under

Section 36-104 it is enforceable only by a personal representative of the estate of the deceased. (R. 205.)

The trial court held that the death action was properly based upon said Section 36-101 and so instructed the jury (R. 160-164), and the Circuit Court of Appeals likewise so held by a divided court. (R. 203 - 214.) The jury awarded respondent said sum of $7,500.00 for the death of her husband, in accordance with the court's instructions, and the jury likewise awarded respondent the sum of $600.00 covering damage to the automobile. (R. 168.) The court entered judgment in respondent's favor and against petitioner for the aggregate sum of $8,100.00, with costs. (R. 191-192.)

Petitioner here makes no complaint of the item for $600.00 damages, but petitioner most respectfully insists that that part of the judgment awarding respondent the $7,500.00 penalty under the New Mexico penal statute (36-101) should not be sustained.

STATEMENT DISCLOSING JURISDICTION OF THIS HONORABLE COURT

Respondent filed her complaint against petitioner in the District Court of Hidalgo County, New Mexico, on April 24, 1939 (R. 6-8), and her summons was served on petitioner on April 27, 1939 (R. 8-9). By the terms of the summons, petitioner was required to appear and answer within thirty days after service of same upon him. (R. 9.) It appeared from respondent's complaint that she was a resident of the State of Texas and that petitioner was a resident of the State of Oklahoma, and that the amount in controversy, exclusive of interest and costs, exceeded $3,000.00, that is, respondent sued for $8,300.00. (R. 6-8.)

Because of the diversity of citizenship and amount involved, petitioner had the cause removed to the United States District Court for the District of New Mexico. Petitioner filed notice of intention to remove the cause on May 27, 1939, and on the same date filed his petition for removal and bond, and on the same date the State District Judge ordered the removal of the cause. (R. 6-12.) The transcript on removal was filed in the United States District Court for the District of New Mexico on June 19, 1939. (R. 8-13.) Thereafter, petitioner filed an answer in the United States District Court on June 21, 1939. (R. 17.)

The cause came on for trial at Albuquerque on September 13, 1939, and the jury awarded respondent $7,500.00 as damages for the death of her husband and the further sum of $600.00 as damages to the automobile. (R. 18 and 168.) Thereafter, on September 20, 1939, final judgment in respondent's favor and against petitioner for the aggregate sum of $8,100.00 was entered in accordance with the verdict of the jury. (R. 191-192.)

On September 29, 1939, petitioner filed his motion for a new trial, (R. 192-199), but the motion was over-ruled by an order October 11, 1939. (R. 200-201.) December 18, 1939, petitioner filed his notice of appeal to the Circuit Court of Appeals for the Tenth Circuit and filed his supersedeas bond in the sum $10,000.00 on the following day. (R. 201.) The certified transcript of the record was filed in the Circuit Court January 10, 1940. (R. 202.) The case was submitted April 22, 1940 before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges. (R. 203.) September 3, 1940, the Honorable Circuit Court of Appeals

for the Tenth Circuit affirmed the judgment in a written opinion by Honorable Sam G. Bratton (R. 203-211), a dissenting opinion being filed by Honorable Orie L. Phillips, (R. 211-214). On September 3, 1940, the judgment of the Honorable Circuit Court of Appeals was entered affirming the judgment of the lower court. (R. 214.) October 7, 1940, petitioner's motion for stay of mandate was granted by the Honorable Circuit Court of Appeals. (R. 216.)

Petitioner therefore presents his petition for writ of certiorari to this Honorable Court as authorized by Judicial Code, Section 240, as amended. (Title 28, Section 347, U. S. C. A., as amended.)

THE QUESTION PRESENTED

The sole question here presented is whether the driver of a motor freight truck, which was being operated as a common carrier of freight for hire, falls within the phrase "driver of any stagecoach or other public conveyance," and whether the majority of the Honorable Circuit Court of Appeals erred in holding that such driver is within such classification and that said penal death statute of New Mexico (36-101) is applicable to respondent's claimed action for the death of her husband, rather than the general death statute (Section 36-102), which under Section 36-104 can be enforced only by the personal representative of the estate of decedent.

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

1. The Honorable Circuit Court of Appeals erred in deciding an important question of local law in a way prob-

ably in conflict with applicable local decisions, in that, the Supreme Court of New Mexico in the case of *Romero v. Atchison, Topeka & Santa Fe Railway Company,* 11 N. M. 679, 72 Pac. 37, held that said penal death statute (Section 36-101) is in derogation of the common law and therefore must be strictly construed; and the Honorable Circuit Court of Appeals, while recognizing said rule of construction, failed and refused to follow a strict construction of the statute in question; and likewise failed to follow the case of *El Paso Cattle Loan Company v. Hunt,* 30 N. M. 157, 228 Pac. 888, holding that a statute in derogation of common law must be strictly construed.

2. The Honorable Circuit Court of Appeals in affirming the judgment below wholly disregarded and refused to apply the doctrine of *ejusdem generis,* which the Supreme Court of New Mexico had adopted as the rule of construction in that state. *Grafe v. Delgado,* 30 N. M. 150, 228 Pac. 601; *Maxwell Lumber Company v. Connelly,* 34 N. M. 562, 287 Pac. 64.

3. In refusing and failing to apply the New Mexico rules of construction as above set out, the Honorable Circuit Court of Appeals wholly disregarded and refused to follow the cases of *Erie Railroad Company v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1187, and *Ruhlin v. New York Life Insurance Company,* 304 U. S. 202, 82 L. Ed. 1290.

4. The Honorable Circuit Court of Appeals, in the majority opinion, extended the operation of the New Mexico penal death statute (Section 36-101) in violation of Article 4, Section 18 of the Constitution of New Mexico which provides:

"No law shall be revised or amended, or the provisions thereof extended by reference to its title only; but each section thereof as revised, amended or extended shall be set out in full."

5. The New Mexico penal death statute (Section 36-101), having been adopted from practically an identical statute of the State of Missouri, the construction placed upon it by the courts and legislature of Missouri was likewise adopted by the State of New Mexico; and while the State of Missouri in 1905 amended its statute to cover and include motor vehicles which had then come into more general use, New Mexico, at the time of becoming a state in 1912, re-adopted its territorial law, which was practically identical with the Missouri statute before its amendment in 1905. Therefore, the majority opinion of the Honorable Circuit Court of Appeals was erroneous in holding that a motor freight truck was included in the operation of said New Mexico penal death statute (Section 36-101) when it had never been amended to include such motor vehicles as had been done in Missouri. Article 22, Section 4, Constitution of New Mexico; *Romero v. Atchison, Topeka & Santa Fe Railway Company*, 11 N. M. 679, 72 Pac. 37; Missouri Laws of 1905, page 135; *Drolshagen v. Union Depot Railroad Company*, 186 Mo. 258, 85 S. W. 344; *Palmer v. Town of Farmington*, 25 N. M. 145, 179 Pac. 227; *Chetham-Strode v. Blake*, 19 N. M. 335, 142 Pac. 1130; *Reymond v. Newcomb*, 10 N. M. 151, 61 Pac. 205; *Henrietta Mining, etc. Company v. Gardner*, 19 S. Ct. 327, 173 U. S. 123, 43 L. Ed. 637; *Willis v. Eastern Trust Company*, 18 S. Ct. 347, 169 U. S. 295, 42 L. Ed. 752; *Hardenbergh v. Ray*, 14 S. Ct. 305, 151 U. S. 112, 38 L. Ed. 93.

6. The question involved is especially important as a

matter of public interest in the State of New Mexico, in that, the precise question has never yet been authoritatively decided by either the Supreme Court of New Mexico or the Supreme Court of the United States, and it is highly desirable that an authoritative decision be made for the guidance of the bench and bar of New Mexico, of motor common carriers, of insurance actuaries and of other persons vitally interested,—especially in view of Judge Phillips' dissenting opinion.

7. The Honorable Circuit Court of Appeals, in its majority opinion, held in a way probably in conflict with the decision of this Honorable Court, the Supreme Court of the United States, on a somewhat similar question in the case of *McBoyle v. United States*, 283 U. S. 25, 75 L. Ed. 816.

Counsel for respondents are Julian P. Harrison of El Paso, Texas, and W. C. Whatley of Las Cruces, New Mexico, and they have been duly served with copies of this petition, supporting brief and the record herein, as evidenced by their receipt and waiver of notice attached hereto.

WHEREFORE, for the reasons set forth herein, as well as in the supporting brief annexed hereto, petitioner respectfully prays this Honorable Court to issue its writ of certiorari to the Honorable Circuit Court of Appeals for the Tenth Circuit, commanding such Honorable Court to send up forthwith a full and complete transcript of the record; that all proceedings be certified to this court and that this cause be reviewed, and the errors of the Honorable Circuit Court of Appeals be reversed and corrected as provided by law; that upon hearing by this Honorable Court, the judgment below be reversed as to the item of

$7,500.00 damages for the death of respondent's husband, and that judgment against petitioner be rendered here only for said sum of $600.00; and that petitioner recover his costs in the Circuit Court of Appeals and in this Honorable Court; and that such further proceedings be held herein as may be provided by law and equity.

ROBERT L. HOLLIDAY
El Paso, Texas

HAROLD L. SIMS
El Paso, Texas
Attorneys for Petitioner

THE STATE OF TEXAS
COUNTY OF EL PASO

Robert L. Holliday being duly sworn says that he is of counsel for Benjamin Cain, petitioner in the foregoing petition for certiorari; that he prepared the foregoing petition and that the allegations therein contained are true, and that there is just cause for same, as he verily believes.

ROBERT L. HOLLIDAY

Subscribed and sworn to before me this 31st day of October, 1940.

MARY ALICE MILLETT,
Notary Public in and for El Paso County, State of Texas.

IN THE

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OCTOBER TERM, 1940

BENJAMIN CAIN,
doing business as
CAIN'S TRUCK LINES,
Petitioner

v.

CLARA BOWLBY,
Respondent

No. .....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF THE COURT

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit was filed September 3, 1940 (R. 203-214), and will be reported in 114 Federal (2) 519.

II.

STATEMENT OF THE CASE

The statement of the case has been, we think, adequately covered in the petition for certiorari, and in the interest of brevity is not repeated here.

III.

THE QUESTION INVOLVED

As said in the petition for certiorari, the sole question here presented is whether the driver of a motor freight truck, which was being operated as a common carrier of freight for hire, falls within the phrase "driver of any stagecoach or other public conveyance," and whether the majority of the Honorable Circuit Court of Appeals erred in holding that such driver is within such classification and that said penal death statute of New Mexico (36-101) is applicable to respondent's claimed action for the death of her husband, rather than the general death statute (Section 36-102), which under Section 36-104 can be enforced only by the personal representative of the estate of decedent.

IV.

ARGUMENT

The sole question presented involves the construction of the New Mexico penal death statute, namely, Chapter 36, Section 101, of the New Mexico Compiled Statutes, 1929, as amended by Chapter 19, Laws of 1931, that is, whether respondent's alleged cause of action for the death of her husband is properly based upon said statute, or

whether, as petitioner contends, such cause of action should have been based upon Section 36-102 of the New Mexico Compiled Statutes, 1929, which is enforceable only by a personal representative of the estate of the deceased. Section 36-101 provides that an action may be brought under it by the surviving wife, and sets an arbitrary forfeiture or penalty of $7,500, while the general death statute (Article 36-102) provides for such compensatory damages as may be proved to have been suffered, and the action under the latter statute may be brought only by the personal representative of the estate of deceased. *Romero v. Atchison, Topeka & Santa Fe Railway Company*, 11 N. M. 679, 72 Pac. 37; *Whitmer v. E. P. & S. W. Co.* (C. C. A. 5th) 201 F. 193. In other words, if, as petitioner contends, respondent has brought her action for the death of her husband under the wrong statute she was not entitled to recover the specific penalty of $7,500, and could not, in her individual capacity as surviving widow, maintain her action at all.

For the convenience of this Honorable Court, there is set out in the appendix hereto the original act of the legislature of the Territory of New Mexico, approved February 18, 1882, omitting certain sections immaterial here. There is also copied the act of the legislature of the Territory of New Mexico approved February 21, 1891, which is now substantially embodied in Sections 36-102 and 36-104 of the Compiled Statutes of New Mexico, 1929. There is also copied chapter 19 of the Laws of 1931 of the State of New Mexico, approved March 10, 1931, which is the statute upon which respondent based her cause of action for the death of her husband.

It is, of course, elementary that at common law no action

would lie for the wrongful death of a human being, and such was the rule generally in the United States and in England until the passage of the famous act of Parliament known as Lord Campbell's Act. After the passage of Lord Campbell's Act, the same was widely imitated in the United States, thus creating a cause of action, or right of action which had not theretofore existed. In construing such statutes, it has been the general rule that they must be strictly construed because they are in derogation of common law. *Insurance Company v. Brame*, 95 U. S. 754; *The Harrisburg*, 119 U. S. 199; *Martin v. Baltimore & Ohio Railroad Company*, 151 U. S. 673; *Michigan Central Railroad Company v. Vreeland*, 227 U. S. 59; *St. Louis & Iron Mountain Railroad v. Craft*, 237 U. S. 648; *Romero v. Atchison, Topeka & Santa Fe Railway Company*, 11 N. M. 679, 72 Pac. 37.

Said Section 36-101 has been held to be in derogation of the common law and it is, therefore, to be strictly construed. *Romero v. Atchison, Topeka & Santa Fe Railway Company*, 11 N. M. 679, 72 Pac. 37; *El Paso Cattle Loan Company v. Hunt*, 30 N. M. 157, 228 Pac. 888.

In the Romero case, the Supreme Court of the Territory of New Mexico said:

> "It will be admitted that at common law no action would lie for an injury caused by the death of a human being. If a right of action now exists, therefore, it must be by virtue of legislative enactment. The subject of death by wrongful act has been brought to the attention of the legislative department of this territory on at least three different occations, and statutes have been enacted, which in determining this case, it becomes our duty to examine, as a right of action, if any exists, must be found in these enactments.";

and further in the opinion the court said:

> "This statute, being in derogation of the common law, must be *strictly construed.*";

and further in the opinion it said:

> "In our opinion, the intention of the legislature in the passage and amendment of the statutes under consideration in this case is apparent from a reading of them, and was as declared in the former part of this opinion, and therefore the terms of the statute should be strictly adhered to. Counsel for appellant contends that this statute is remedial in its nature, and should be liberally construed; but, without concurring in the views of counsel, it is proper to say that there can be no such liberality indulged in as would authorize the court, in the name of construction, to change the plain terms of an unambiguous statute so as to provide a remedy which under the statute does not exist."

In *Whitmer v. El Paso & Southwestern Company,* 201 Federal 193, the distinction between the two death statutes of New Mexico is clearly recognized and strictly and properly applied. In that case, an action was brought for the death of a child stepping into a hole in a railroad bridge while walking across it pursuant to a habitual custom of children and adults to walk over the bridge. The action was brought by the administrator under then Section 3214 (now Sections 36-102, 36-104), instead of under then Section 3213 (now Section 36-101). The contention was made that the action should not have been brought by the personal representative but should have been brought by the named beneficiaries under the first statute, now 36-101, but the court overruled such contention.

Thus when the provisions of the "Railroad and Stage Coaches" act are analyzed, the mere fact that he who

caused a death is a common carrier is not sufficient to create a liability under the act. To create a liability under the statute, the death must have resulted from "the negligence, unskillfulness or criminal intent of an officer, agent, servant of employee *whilst running, conducting or managing any locomotive, car or train of cars or any driver of any stage coach or other public conveyance.*"

The New Mexico legislature has said in effect: "that only those common carriers operating railroads and stage coaches shall be liable for forfeiture and penalties for wrongful death occasioned by the negligence of their agents, servants and employees while running locomotives, trains and stage coaches, while other persons, including common carriers, not running locomotives, trains or stage coaches shall be liable to a personal representative of the deceased for such damages as the jury may deem fair and just."

Judge Bratton, in writing the majority opinion of the court below, recognized the foregoing rule but simply disregarded it and failed to apply it, as he should have done under the holdings of this Honorable Court in the cases of *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1187; *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202, 82 L. Ed. 1290; *Cities Service Oil Company v. Dunlap*, 60 S. Ct. 201. In the course of his opinion, Judge Bratton said that the penal death statute (36-101) was in general and comprehensive terms and prospective in operation, and therefore applied to petitioner's motor freight truck and driver. In the name of construction, he changed the plain terms of the statute so as to provide a remedy which under the statute does not exist.

Certain it is that petitioner's motor freight truck was not a locomotive, car or train of cars, and neither was it a stage-coach. Therefore, said statute 36-101, without extending its plain meaning, can have no application. The only way that the penal statute could apply would be to consider petitioner's motor freight truck as a stagecoach. The only similarity between a motor freight truck and a stagecoach is that both of them run on wheels. The uses to which they are put are far different. The language used in the penal death statute does not fairly include a motor freight truck. Judge Bratton, writing for a majority of the court below, has thus extended the operation of the penal death statute (36-101) far beyond what it actually says, and in the name of construction has not only extended the effect of the statute but stretched it so far out of shape as to make it unrecognizable to the members of the Territorial Legislature which originally passed it. As so interpreted, its meaning is distorted and its effect has been extended so as to violate the spirit, if not the letter, of Article 4, Section 18, of the Constitution of New Mexico, which provides:

> "No law shall be revised or amended, or the provisions thereof extended by reference to its title only; but each section thereof as revised, amended or extended shall be set out in full."

There is a further rule of statutory construction which has been adopted by the courts of New Mexico, and it should have been followed in deciding the instant case in the court below, namely, the doctrine of *ejusdem generis.* This doctrine is stated in Corpus Juris as follows:

> "By the rule of construction known as *ejusdem generis,* where general words follow the enumera-

> tion of particular classes of persons or things, the general words will be construed as applicable only to the persons or things of the same general nature or class as those enumerated, and this rule has been held especially applicable to penal statutes." 59 C. J., Section 581, page 981.

Said rule of construction has been adopted by the Supreme Court of New Mexico. *Grafe v. Delgado,* 30 N. M. 150, 228 Pac. 601; *Maxwell Lumber Company v. Connally,* 34 N. M. 562, 287 Pac. 64. Under such rule of construction the phrase "other public conveyance" as used in said penal death statute (36-101) should be limited to conveyances like or analogous to a stagecoach.

Corpus Juris says of the word "stagecoach":

> "A coach or other carriage running regularly from one place to another for the conveyance of passengers; a coach that regularly carries passengers from town to town; a coach which is used by the owner to carry passengers from one point to another; any carriage that travels by set stages; a vehicle that starts from some one point at certain stated intervals." 58 C. J., page 1314, Section 4.

A stage coach is defined in the following cases: *Talcott Mountain Turnpike v. Marshall,* 11 Conn. 185; *Burton v. Monticello & Turnpike Company,* ..... Ky. ....., 173 S. W. 144; *Burton v. Monticello & Turnpike Company,* ..... Ky. ....., 109 S. W. 319; *Cincinnati L. & S. Turnpike Company v. Neil,* 9 Ohio 11.

It is true that the old time stagecoach probably carried not only passengers but also mail or baggage, but it certainly was not employed to carry heavy freight regularly. The word "stagecoach" connotes a vehicle of light con-

struction, built for what was great speed in its time, and fitted out to carry passengers. The modern motor freight truck hardly conjures up a picture or vision of a fast moving coach laden with passengers, but rather, suggests the old-time covered wagon which was designed to carry heavy loads. If contemporary writers are to be believed, especially the writers of fiction, the old-time stagecoach sometimes carried gold shipments, United States mail and the hand baggage of its passengers, but it was not designed for, nor used as a vehicle for carrying heavy loads of freight. It was the "Streamliner" of its day. The stagecoach was substantially unlike a freight truck.

Other jurisdictions have considered somewhat similar questions and have applied the doctrine of *ejusdem generis*. *Pulom v. Jocob Dold Packing Co.* 182 Fed. 356; *Lipscomb v. H. & T. C. Railroad Co.*, 95 Tex. 5, 64 S. W. 923; *Goldsmith v. Orange Belt Securities* (Fla.) 156 So. 35; *O'Connor v. Great Lakes Pipeline Company*, 63 Fed. 523; *Mitchell v. New York Life Insurance Co.*, 75 Fed. (2) 107; *Mallory v. Pioneer Southwestern Stages*, 54 Fed. (2) 559; *Farmers' & Mechanics' National Bank v. Hanks*, 104 Tex. 320, 137 S. W. 1120; *Hendrick v. Walton*, 69 Tex. 192, 6 S. W. 749; *North American Accident Insurance Company v. Pitts*, (Ala.) 104 So. 21, 40 A. L. R 1171; *Washington Electric Vehicle Transpartation Co. v. District of Columbia*, 19 App. D. C. 462.

In the case of *McBoyle v. United States*, 283 U. S. 25, 75 L. Ed. 816, this Honorable Court had a somewhat similar question before it. In that case, the National Motor Vehicle Theft Act (the Dyer Act) was before the court for construction, and this Honorable Court in an opinion by the late, great Mr. Justice Holmes held that said Act

did not apply to theft of an airplane. Under the Dyer Act, as it then was written, the term "motor vehicle" was said to include an automobile, automobile truck, automobile wagon, motorcycle, *or any other self-propelled vehicle not designed for running on rails.* That Act was prospective in its nature and the definition of a motor vehicle was certainly more comprehensive than the phrase "stagecoach or other public conveyance," and yet, Mr. Justice Holmes, speaking for this Honorable Court, held that since an airplane was substantially unlike the other named vehicles that the Dyer Act did not apply to the theft of an airplane.

The majority opinion in the court below cited the case of ***Mallory v. Pioneer Southwestern Stages,*** (C. C. A. 10th) 54 Fed. (2) 559, as sustaining the judgment in the instant case; but a careful reading of the opinion in the Mallory case shows that no question was raised by either party as to whether the passenger motor bus involved in that case came within the meaning of said penal death statute, 36-101. A careful reading of the case shows that the question was not actually raised or decided because both parties and the court seemed to assume that a passenger motor bus did come within said statute. Moreover, even if a motor bus does come within said penal death statute it does not follow that a motor freight truck should. A motor bus engaged in the transportation of passengers is very similar in its usage to the old-time stagecoach, while a motor freight truck, engaged solely in carrying heavy loads of freight, is substantially dissimilar to the stagecoach.

After all, in arriving at a correct decision in the instant case it is essential to ascertain the legislative intent, and

we think one of the most significant things in ascertaining the legislative intent was well stated by Judge Phillips in his dissenting opinion, as follows:

> "If the statute is to be construed as held by the majority, the owner or operator of a freight truck is placed in a special category and his liability for wrongful death is limited to $7500. On the other hand, a private owner or operator of a truck or an operator of a truck as a private carrier, who negligently causes a wrongful death, would come within Sec. 36-102, N. M. Stat. Ann. 1929, and would be liable for full compensatory damages which in most cases of wrongful death, would substantially exceed $7500. A carrier of passengers by train, stage, or bus might suffer an accident where a large number of passengers would be killed and where the aggregate liability would be very large. There is some reason to limit the liability of such a carrier. No such reason exists with respect to a freight truck which does not carry passengers. Moreover, the public highways belong to the public and their primary and preferred use is for private purposes. Their use for purposes of gain is special and extraordinary. It is unreasonable and unjust to prefer the public carrier making use of the public highway for the purposes of gain which is a special and extraordinary use, by limiting his liability for wrongful death to $7500 and subjecting the private user, for whom the highway is primarily provided, to unlimited liability for wrongful death. I cannot think it was intended by the legislature to subject private operators of trucks on the public highways to unlimited liability in damages for wrongful death and to limit the liability of the public operators of trucks to $7500. Such a limitation in favor of the public carrier would be manifestly unreasonable and unjust and I do not think an intent to so prefer should be attributed to the legislature in the absence of plain language in

the statutory enactment manifesting such intent." (R. 213-214.)

In the majority opinion, Judge Bratton brushes aside this line of reasoning with the statement: "The suggestion seems to proffer its own answer. That is a question of policy for the legislature, not the courts." (R. 208.) We think Judge Bratton's statement begs the question and assumes that the legislature meant to include a motor freight truck; whereas, as Judge Phillips pointed out, it was a highly important consideration in trying to ascertain the legislative intent.

It is a well established rule in statutory construction that where a statute is adopted from another state or territory, the construction placed on it by such state or territory is also adopted, unless some good reason appears for not following such construction. *Palmer v. Town of Farmington*, 25 N. M. 145, 179 Pac. 227; *Chetham-Strode v. Blake*, 19 N. M. 335, 142 Pac. 1130; *Reymond v. Newcomb*, 10 N. M. 151, 61 Pac. 205;;*Henrietta Mining, etc., Co., v. Gardner*, 19 S. Ct. 327, 173 U. S. 123, 43 L. Ed. 637; *Willis v. Eastern Trust Company*, 18 S. Ct. 347, 169 U. S. 295, 42 L. Ed. 752; *Hardenbergh v. Ray*, 14 S. Ct. 305, 151 U. S. 112, 38 L. Ed. 93.

The New Mexico penal death statute (36-101) was adopted from the State of Missouri. Thus, in *Romero v. Atchison, Topeka & Santa Fe Railway Company*, 11 N. M. 679, 72 Pac. 37, it is said:

> "Many laws of this territory have been borrowed from the State of Missouri, and, as the statute now under consideration is identical with that of Missouri upon this subject, it will be conceded that this is one

> of the statutes which we borrowed from Missouri; and, if so, the rule is to adopt the construction of the act of the Supreme Court of the state from which it was borrowed."

The Missouri death statute was construed in the case of *Drolshagen v. Union Depot Railroad Company*, 186 Mo. 258, 85 S. W. 344. That was a case brought for the death of plaintiff's son because of alleged negligence of a motorman or operator of a street car of defendant. The Supreme Court of Missouri held that the motorman of a street car is not a driver within the meaning of the death statute giving an action for death from the negligence *"of any driver of any stage coach or other public conveyance."*

The case just cited was decided by the Supreme Court of Missouri on December 22, 1904, and in the following year the legislature of Missouri, evidently because of said decision, amended their death statute so that the act was made to apply to operators of street cars, electric or terminal cars or trains, automobiles and motor cars and thus first brought street cars and motor vehicles used as public conveyances within its operation. *Page 135, Laws of 1905*, State of Missouri. The State of New Mexico has not seen fit to include motor vehicles, automobiles or trucks although the original act was copied from Missouri by New Mexico in 1882.

Now Judge Bratton, in the majority opinion of the court below, said that the rule of statutory construction here contended for did not apply because the Drolshagen case was decided long after the statute was enacted by the territorial legislature of New Mexico. That is true, but Judge Bratton overlooks the fact that at the time New

Mexico became a state in 1912, the people of New Mexico in adopting a constitution for their state also adopted the laws of the territory. Article 22, Section 4, New Mexico Constitution provides:

> "All laws of the Territory of New Mexico in force at the time of its admission into the Union as a state, not inconsistent with this constitution, shall be and remain in force as the laws of the state until they expire by their own limitation, or are altered or repealed; and all rights, actions, claims, contracts, liabilities and obligations, shall continue and remain unaffected by the change in the form of government."

Thus, it will be seen that the people of New Mexico re-adopted the penal death statute, Section 36-101, some seven or eight years after the decision of the Drolshagen case in Missouri. We, therefore, respectfully insist that the people of New Mexico, at the time of the admission of New Mexico as a state, adopted the construction of the penal death statute placed upon it by the Supreme Court of Missouri in 1904 and the legislature of the State of Missouri in 1905.

In the case of *Palmer v. Town of Farmington*, 25 N. M. 145, 179 Pac. 227, the Supreme Court of New Mexico construed a statute of New Mexico which had been adopted from an Arkansas statute, and applied the rule of statutory construction here contended for. In the course of the opinion, Judge Roberts, speaking for the Supreme Court of New Mexico, said:

> "This case has been cited with approval in later cases in the same state and has never been departed from. *Bell v. Phillips*, 116 Ark. 167, 172 S. W. 864;

Riddle v. Bailey, 197 S. W. 27, 130 Ark. 161; the Supreme Court of Arkansas having thus held that the statute required the signers of the petition to be, not only the owners of real property within the district to be improved, but actual residents therein, presumptively, when the Legislature of this state adopted the statute, it intended that it should receive a similar construction, and no controlling reason has been advanced by appellees in support of a different interpretation.

"Another significant fact is that the Legislature of Arkansas, by act of March 27, 1905 (Laws 1905, p. 300), amended the statute under consideration in the Cotter Case by striking out the word "resident," so that the statute read, "When any ten owners of real property in such city or incorporated town, or any portion thereof, shall petition," etc. Our Legislature, in adopting the statute, elected to take the original statute, rather than the amended one." 179 Pac. 231.

So, the people of New Mexico in 1912 at the time New Mexico became a state chose to adopt the original Missouri statute which did not include motor freight trucks and like vehicles, rather than the amended Missouri statute of 1905.

For the reasons set out above, we most respectfully submit that the petition for certiorari should be granted, and that the judgment insofar as the death action is concerned should be reversed; that Judge Phillips, in his dissenting opinion correctly decided the case.

V.

CONCLUSION

WHEREFORE, petitioner respectfully prays that writ of certiorari be granted and that upon hearing of this cause, the judgment below as to the death action be

reversed and judgment be here rendered against petitioner for said sum of $600 only; and that petitioner recover his costs in the Circuit Court of Appeals and in this Honorable Court, and that petitioner have such other relief as he may be entitled to, either at law or in equity.

ROBERT L. HOLLIDAY,
El Paso, Texas,

HAROLD L. SIMS,
El Paso, Texas,
Attorneys for Petitioner.

Robert L. Holliday, one of the counsel preparing the foregoing brief and petition, hereby certifies that the same is made in good faith; that in his opinion there are good grounds for same and that such petition and brief are not interposed for delay.

ROBERT L. HOLLIDAY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

BENJAMIN CAIN,
doing business as
CAIN'S TRUCK LINES,
Petitioner

v.

CLARA BOWLBY,
Respondent

No. .....

Receipt of a copy of the petition for certiorari and supporting brief and the record is hereby acknowledged, and further notice of filing and presentation of such petition and brief is waived; and the Honorable Clerk of the Supreme Court may submit same within twenty days from date of filing as provided in Paragraph 3 of Rule 38 of the Supreme Court of the United States.

JULIAN P. HARRISON,
El Paso, Texas,

W. C. WHATLEY,
Las Cruces, New Mexico,
Attorneys for Respondent.

APPENDIX

CHAPTER LXI

AN ACT Relating to Damages.

CONTENTS

Sections 1-4. Deaths on railroads resulting from carelessness, criminal or otherwise, work damages. Actions at law and limitations.

Sec. 5. Contributory consequences.

Sec. 6-7. Of setting fires in wood, prairie or marsh. Damages.

Sec. 8. Of damages for animals killed or injured on railroads.

Sec. 9. Actions for damages must be brought within one year.

Be it enacted by the Legislative Assembly of the Territory of New Mexico:

SECTION 1. Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant, or employee, whilst running, conducting or managing any locomotive, car, or train of cars, or of any driver, of any stage coach or other public conveyance, while in charge of the same as driver; and when any passenger shall die from any injury resulting from, or occasioned by any defect or insufficiency in any railroad, or any part thereof, or in any locomotive or car, or in any stage coach, or other public conveyance, the corporation, individual or indi-

viduals, in whose employ such officer, agent, servant, employee, engineer or driver, shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stage coach, or other public conveyance, at the time any injury is received, resulting from, or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying, the sum of five thousand dollars, which may be sued and recovered; first, by the husband or wife of the deceased; or second, if there be no husband or wife, or if he or she fails to sue within six months after such death then by the minor child or children of the deceased; or third, if such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor. In suits instituted under this section, it shall be competent for the defendant for his defense to show that the defect or insufficiency named in this section, was not of a negligent defect or insufficiency.

Sec. 2. Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act or neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.

Sec. 3. All damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in Section 1 of this act, and in every such action the jury may give such dam-

ages, not exceeding five thousand dollars, as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties, who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default.

Sec. 4. The jury on the trial of any issue, or inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure.

* * * * * *

Sec. 9. Every action instituted by virtue of the provisions of this act must be brought within one year after the cause of action shall have accrued, or after this act shall go into effect.

Sec. 10. All acts and parts of acts in conflict with this act are hereby repealed, and this act shall take effect and be in force from and after its passage.

Approved February 18, 1882.

CHAPTER XLIX

AN ACT to Amend Sections 2309 and 2310 of the Compiled Laws of New Mexico of 1884. H. B. 107; Approved February 21, 1891.

Section 1. Right of action for injury to person notwithstanding death may have resulted.

Sec. 2. Disposition of money arising from an action for damages.

Be it enacted by the Legislative Assembly of the Territory of New Mexico:

Section 1. Section 2309 of the Compiled Laws of New Mexico of 1884 be and the same is so amended as to read as follows, viz.:

"Section 2309. Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, although such death shall have been caused under such circumstances as to amount in law to a felony, and the act or neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured."

Sec. 2. Section 2310 of the Compiled Laws of New Mexico of 1884 be and the same is hereby amended so as to read as follows, viz.:

"Section 2310. Every such action as mentioned in the next preceding section shall be brought by and in the name or names of the personal representative or representatives of such deceased person, and the jury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury or injuries resulting from such death to the surviving party or parties entitled to the judgment, or any interest therein, recovered in such action, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default. The proceeds of any judgment obtained in any such action shall not be liable for any debt of the deceased: *Provided*, He or she shall have left a husband, wife, child,

father, mother, brother, sister, or child or children of the deceased child, but shall be distributed as follows:

"*First.* If there be a surviving husband or wife, and no child, then to such husband or wife; if there be a surviving husband or wife and a child or children or grandchildren, then equally to each, the grandchild or grandchildren taking by right of representation; if there be no husband or wife, but a child or children, or grandchild or grandchildren, then to such child or children and grandchild or grandchildren by right of representation; if there be no child or grandchild, then to a surviving brother or sister, or brothers or sisters, if there be any; if there be none of the kindred hereinbefore named, then the proceeds of such judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons."

Sec. 3. All acts and parts of acts in conflict with this act are hereby repealed, and this act shall take effect and be in force from and after its passage.

CHAPTER NO. 19

(Laws of 1931)

An Act to Amend Section 36-101 of the 1929 New Mexico Statutes Annotated, by Increasing the Liability of Common Carriers for Death by Wrongful Act.

S. B. NO. 15; Approved March 10, 1931.

Be It Enacted by the Legislature of the State of New Mexico:

Section 1. Section 36-101, The 1929 New Mexico Statutes Annotated, is hereby amended to read as follows:

"Whenever any person shall die from any injury resulting from, or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive car, or train of cars, or of any driver of any stage coach or other public conveyance, while in charge of the same as driver; and when any passenger shall die from injury resulting from, or occasioned by any defect or insufficiency in any railroad, or any part thereof, or in any locomotive or car, or in any stage coach, or other public conveyance, the corporation, individual or individuals, in whose employ any such officer, agent, servant, employee, engineer or driver, shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stage coach, or other public conveyance, at the time any injury is received, resulting from, or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying the sum of *Seven Thousand Five Hundred Dollars*, which may be sued and recovered; first, by the husband or wife of the deceased; or second, if there be no husband or wife, or if he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or third, if such deceased be a minor and unmarried, then by the father and mother; or fourth, if the deceased be over twenty-one years of age and unmarried, by a dependent father or mother or dependent brother or sister, who may join in the suit; and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor. In suits instituted under this section, it shall be competent for the defendant for his defense to show that the defect or insufficiency named in this section, was not of a negligent defect or insufficiency."